IN THE

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ANGELIKA L. SCHNEIDER, *Petitioner*,

v.

DEAN RUSK, individually, and as Secretary of State, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Angelika L. Schneider, petitioner herein, by her attorneys, prays that a writ of certiorari issue to the Court of Appeals to review the above case pending in that Court.

OPINIONS BELOW

No opinions were issued by the courts below. The District Court without opinion entered an Order and Judgment (Appendix A) granting respondent's mo-

tion for judgment on the pleadings and dismissing the complaint. The Court of Appeals, after argument, issued an order *sua sponte* postponing its decision herein until this Court's decision of *Herter* v. *Cort*, No. 567, October Term 1960, and denied Petitioner's motion to vacate this order and for a prompt decision of this case by the Court of Appeals, or, in the alternative, its certification to this Court. The text of these orders appear in Appendix B.

JURISDICTION

Petitioner brought this action for declaratory judgment in the District Court pursuant to Sections 11-305 and 11-306 of the District of Columbia Code, 28 U.S.C. §§ 2201, 2202 and 2282, and 5 U.S.C. § 1009. Final judgment was entered by the District Court on August 17, 1960 (Appendix A) and a timely appeal followed. On March 24, 1961, the Court of Appeals after argument determined *sua sponte* to postpone decision in this case until the decision of this Court in *Herter* v. *Cort*, (Appendix B) thus delaying a final decision in this case by more than a year.[1] Petitioner asked the Court of Appeals to vacate this order postponing its decision and requested the Court either to render prompt decision in this case or in the alternative to certify the present case to this Court under 28 U.S.C. § 1254(3). This motion was denied on April 25, 1961 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] See pages 12-13, *infra*.

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived petitioner of her citizenship without due process of law, contrary to the Fifth Amendment, in that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the petitioner.

4. Whether the District Court had jurisdiction under the conventional jurisdictional statutes and under the Administrative Procedure Act to entertain an action for declaration of citizenship through petitioner, whose citizenship was withdrawn while she was outside the country, was not in a position to and did not attempt to pursue the remedy provided by Section 360 of the Immigration and Nationality Act of 1952.

STATUTE INVOLVED

Section 352(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

Loss of nationality by naturalized national

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C. § 1503, reads as follows:

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in

habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

STATEMENT OF THE CASE

Petitioner was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (J.A. 2, 9, 16).

Petitioner lived in the United States continuously from 1939 to 1959—from the age of five to the age of twenty. She received all of her schooling in this country and was graduated from Smith College in 1954. Thereafter, on a scholarship given by the Institute of International Relations in New York, she studied for a year in Switzerland and then continued studying for a year in Paris. She returned to the United States in April 1956 (J.A. 2, 9-10, 16).

On June 6, 1956, petitioner left the United States to marry Dr. Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom petitioner had become engaged while studying in Paris. Since that time, petitioner has lived continuously with her husband in the Federal Republic of Germany except for one six-week family visit to the United States in September and October of 1957 (J.A. 2, 10, 16).

The two sons born to petitioner, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (J.A. 2-3, 10, 17).

During all the time of her residence in Germany until June 1959, petitioner was in possession of a valid United States passport. In June 1959; however, the United States Consulate in Dusseldorf refused to grant petitioner an extension of her passport contending that petitioner had lost her United States citizenship. In September 1959; petitioner was requested by the American Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, petitioner was served with a "Certificate of Loss of Nationality of the United States" (J.A. 3, 10-11, 17-19).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed by letter of January 20, 1960, the previous administrative decision that petitioner had lost her citizenship pursuant to Section 352(a)(1) of the Immigation and Nationality Act of 1952. This action was, under the regulations, the "final administrative determination" of the State Department, leaving petitioner without further administrative remedy. Pursuant to this ruling petitioner is now being denied all rights and privileges of United States citizenship, including a United States passport (J.A. 12, 19).

Petitioner is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (J.A. 1, 4, 8-9).

Proceedings Below

On February 1, 1960, petitioner filed a complaint in the District Court for the District of Columbia alleging that Section 352, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States, and seeking a declaration that petitioner is a citizen of the United States as well as certain other relief.

On July 19, 1960, the District Court denied the motion to dismiss for lack of jurisdiction filed by the Government. On August 17, 1960 the District Court entered an Order and Judgment (Appendix A) denying petitioner's motion for summary judgment and granting respondent's motion for judgment on the pleadings, and dismissing the complaint. The Order and Judgment of the District Court recited that "Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States".

Petitioner took a timely appeal to the United States Court of Appeals for the District of Columbia Circuit from the District Court's Order and Judgment of August 17, 1960. The Government took a cross-appeal from the court's order of July 19, 1960.

The Court of Appeals by an order of March 24, 1961 (Appendix B) determined *sua sponte* to postpone its decision in this matter pending decision by this Court of *Herter* v. *Cort*, No. 567 October Term 1960. Petitioner on April 5, 1961 filed a motion with the Court of Appeals asking it to vacate its order postponing its decision and asking the Court either to decide the case promptly or for a certification to this Court. The Court of Appeals denied this motion on April 25, 1961 (Appendix B).

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important constitutional issue affecting the rights of naturalized citizens. It challenges the constitutionality of Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for three years in the country of his origin shall automatically lose his American citizenship. No similar provision applies to the native-born.

The principal issue raised here is whether Congress, under its foreign affairs power, can attach the consequence of denaturalization to the mere residence abroad of naturalized Americans. A provision of this kind was first enacted into law as part of the Nationality Act of 1940.

The scope of Congressional power to attach to certain conduct the withdrawal of American citizenship is a problem with which this Court has recently been much concerned. This was the question in *Perez* v. *Brownell*, 356 U.S. 44 (1958) and in *Trop* v. *Dulles*, 356 U.S. 86 (1958). It is the issue in two cases now pending before this Court, *Herter* v. *Cort*, No. 567, October Term, 1960 and *Rogers* v. *Mendoza-Martinez*, No. 566, October Term, 1960.

The issues presented by this case are closely related to the questions this Court will consider in *Cort* and *Mendoza*. In each case a statute providing for the withdrawal of citizenship is sought to be justified as a proper exercise of Congress' foreign affairs power. In *Cort and Mendoza*, it is Section 401(j) of the Nationality Act of 1940, 54 Stat. 1168, now Section 349(a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(10) which provides for the denaturalization of persons who leave the United

States in order to avoid the draft. Here, of course, it is Section 352. In *Cort and Mendoza*, as well as here, the Government argues that Congress under its foreign affairs power may provide for the termination of the citizenship of persons coming within the terms of these respective provisions because their residence abroad as United States citizens is likely to result in complications or frictions with other countries. Each of these cases involves an application of this Court's ruling in *Perez* that for denaturalization to be justified as an exercise of the foreign affairs power "the means—withdrawal of citizenship—must be reasonably related to the end—here, the regulation of foreign affairs."

This case also presents more clearly than *Cort* and *Mendoza* the question whether Congress, in the exercise of its foreign affairs power, can attach loss of American citizenship to a neutral act—here residence abroad—i.e., an act which is not in the least inconsistent with allegiance to the United States.[2] This question is left unresolved in *Perez*.

The seriousness of the constitutional question presented here is underlined by the fact a decision upholding the legislation would mark the first substantive exception from the deeply rooted principle that native-born and naturalized citizens are equal in every respect

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[2] In *Perez*, where this Court upheld the constitutionality of withdrawing the citizenship of those who voted in foreign elections, the Court noted, 356 U.S. at 60:

> ". . . Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."

(with the single exception to the constitutional provision limiting the presidency to the native-born). See *Luria* v. *United States*, 231 U.S. 9 (1913), *Osborn* v. *The Bank of the United States*, 22 U.S. 738, 827-828 (1824). The provision, now in Section 352, which was originally enacted into law as Section 404 of the Nationality Act of 1940, 54 Stat. 1137, represents the *first* and *only* substantive discrimination between native-born and naturalized citizens in any act of Congress.[3]

A further constitutional question raised here as well as in *Cort* and *Mendoza* is whether Section 352 is, as was the statute considered by the Court in *Trop* v. *Dulles*, *supra*, penal in nature and a cruel and unusual punishment within the terms of the Eighth Amendment.

A joint consideration of this case with *Cort* and *Mendoza* would appear to be most helpful and may well provide this Court with an opportunity to define more closely the limits, under the Constitution, of the Congressional power to provide for the withdrawal of citizenship. Indeed, a joint consideration of these cases may be even more fruitful here than it was in *Perez*

[3] Prior to that time, the Act of March 2, 1907, 34 Stat. 1228, had made a distinction between native-born and naturalized citizens, but this was procedural and not a substantive one. The 1907 Act established rebuttable presumption that a naturalized citizen who returned to the country of his origin for a period of two years had voluntarily abandoned his American citizenship. This presumption ceased upon the return of a citizen to the United States. 28 Op. Atty. Gen. 504 (1910). It was "easy to preclude, and easy to overcome." *United States* v. *Gay*, 263 U.S. 253, 285. It imposed upon the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not, as does the present law, automatically deprive American citizens of their citizenship on grounds of mere residence abroad.

and *Trop*, where the respective majority and dissenting opinions contain frequent cross-references to each other. For we believe constitutional issues here are closer to those in *Cort* and *Mendoza* than *Trop* was to *Perez*. The loss of nationality provision in *Trop* was based on the war power, and that in *Perez* on the foreign affairs power, while in both *Cort* and *Mendoza*, as well as in this case, the denaturalization is sought to be justified as a proper exercise of Congress' foreign affairs power.

This case and the *Cort* case also present the same important procedural question. That is whether Section 360 of the Immigration and Nationality Act is the exclusive remedy for a person such as petitioner who is denied the rights of American citizenship while abroad and therefore precludes review of such a ruling through an action for declaratory judgment. The Government raised this issue in this case in its cross-appeal from the decision of the District Court and will certainly present it here. The importance of this question for the administration of the Immigration and Nationality Act is underlined by the Government's jurisdictional statement in *Cort*. The differing factual situations presented by these two cases, we feel, may assist the Court in construing this provision.

If this Court is to consider this case together with the closely related *Cort* and *Mendoza* cases, it must grant the writ prior to final judgment by the Court of Appeals. That Court, after argument, postponed the decision of this case until this Court decides the *Cort* case. This would result in a delay of well over a year, for it would require (a) postponement of the decision until the action of this Court in the pending *Cort* case, (b) decision by the Court of Appeals and (c) only then

a review by this Court. We submit that rather than await the lengthy process contemplated by the Court of Appeals, this Court should grant the writ prior to judgment and consider this case together with *Cort* and *Mendoza*.

The constitutional and procedural questions involved in this case are clearly and squarely presented and are ripe for a decision by this Court. The record in this case is short and simple, and all the essential facts are undisputed. The District Court decided this case on cross-motions, a motion for a judgment on the pleadings by the Government and a motion for summary judgment by petitioner. A prior decision by the Court of Appeals could do little to further clarify the issues.

We think that in any event the questions raised here must be ultimately decided by this Court. If certiorari were denied here, the Court of Appeals would, after the announcement of this Court's ruling in *Cort* and *Mendoza*, render its own decision in the present cases. In this extremely delicate field of constitutional law, the correct application of these decisions would probably be by no means obvious, and the losing party will no doubt seek review in this Court.

Also, the delay resulting from the Court of Appeals' postponement would be unduly harsh on petitioner. As a result of the State Department's denial of her rights of citizenship, petitioner is living as a stateless person in the Federal Republic of Germany under a temporary permit issued by the German Government. She is without diplomatic protection. She has no assurance of how long the German Government will extend its permit, which is available merely as a matter of grace. Such a delay would also leave undecided an important

constitutional question affecting thousands of naturalized citizens who are living abroad or who contemplate doing so in the future.

Under these circumstances, we submit that this Court should grant the writ prior to the final judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1) and Rule 20 of this Court. This would be fully in accord with the policy of this Court to grant the writ prior to judgment where other cases presenting closely related issues are already pending before the Court. This the Court has done on numerous occasions where, as here, an important constitutional question was raised, *Taylor* v. *McElroy*, 360 U.S. 709, 710 (1959); *Kinsella* v. *Krueger*, 351 U.S. 470, 473 (1956); *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954); *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240, 294 (1935); see also, *Brown* v. *Board of Education*, 344 U.S. 1, 3 (1952), or where other significant issues were presented, *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946); *Graham* v. *Goodcell*, 282 U.S. 409, 415 (1931); *Johnson* v. *United States Ship. Bd. E. Fleet Corp.*, 280 U.S. 320, 325 (1930); *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 299 (1925).

CONCLUSION

The important constitutional and procedural questions presented by this case call for a decision by this Court. The case is ripe for decision. The issues raised here are closely related to those presented by two cases already pending before this Court, *Cort* and *Mendoza*. This Court should consider this case together with these cases already before it. Nothing is to be gained and hardship to petitioner may result by waiting for a final judgment by the Court of Appeals, which has post-

poned its decision until this Court decides the *Cort* case. Accordingly, the writ should be granted.

Respectfully submitted,

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Of Counsel

May 12, 1961

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, individually and as Secretary of *State, Defendant*.

Order and Judgment

Plaintiff having moved for summary judgment and defendant having moved for judgment on the pleadings, and the Court having considered the complaint, the answer and the affidavits filed herein as well as the previous proceedings herein, and being fully advised in the premises, and being advised of the order entered in this matter on July 19, 1960 by Judge Matthews, holding that no substantial constitutional question is presented by said complaint, and the Court being of the opinion that Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States,

It is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff's motion for summary judgment be and it is hereby denied, and

2. That judgment on the pleadings be and it is hereby entered for defendant, and the complaint be and it is hereby dismissed.

GEORGE L. HART, JR.
Judge

Date: August 17, 1960

No objection as to form:
MILTON V. FREEMAN
Counsel for plaintiff

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,959

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually and as Secretary of State, *Appellee*

September Term, 1960

No. 16,002

DEAN RUSK, Secretary of State, *Appellant*,

v.

ANGELIKA L. SCHNEIDER, *Appellee*.

Before: WILBUR K. MILLER, Chief Judge, and BAZELON and BURGER, Circuit Judges.

Memorandum

The court *sua sponte* has determined to postpone its decision in these cases pending decision by the Supreme Court of *Cort* v. *Herter*, No. 567, Oct. Term, 1960.

PER CURIAM.

Dated : March 24, 1961

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,959

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually and as Secretary of State, *Appellee*.

No. 16,002

DEAN RUSK, *Appellant*,

v.

ANGELIKA L. SCHNEIDER, *Appellee*.

Before: WILBUR K. MILLER, Chief Judge, BAZELON and BURGER, Circuit Judges, in Chambers.

Order

Upon consideration of the motion of Angelika L. Schneider to vacate the order of this court dated March 24, 1961, postponing decision in this case and for prompt disposition of the case, or in the alternative for certification to the Supreme Court of the United States, it is

ORDERED by the court that the aforesaid motion is denied.

PER CURIAM.

Dated: April 25, 1961

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Office Supreme Court, U.S.
FILED
JUN 9 1961
JAMES R. BROWNING, Clerk

No. 963

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANGELIKA L. SCHNEIDER, PETITIONER

v.

DEAN RUSK, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 963

ANGELIKA L. SCHNEIDER, PETITIONER

v.

DEAN RUSK, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

No opinion has been rendered by the court of appeals in this case since it is now pending in that court on appeal.

JURISDICTION

The jurisdiction of this Court to grant certiorari before judgment in the court of appeals is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the issues in this case (primarily the constitutionality of the statute providing for loss of nationality by a naturalized alien residing abroad in his native country) are sufficiently similar to the issues involved in *Rusk* v. *Cort,* No. 567, this Term,

presenting the constitutionality of the statute providing for loss of nationality for remaining abroad to avoid military service, to warrant certiorari before judgment in the court of appeals.

STATUTE INVOLVED

Section 352(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 269, provides:

> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> * * * * * *

STATEMENT

This case is now pending in the Court of Appeals for the District of Columbia Circuit on petitioner's appeal from the judgment of the District Court for the District of Columbia, affirming the determination of the Secretary of State that petitioner had lost her American citizenship under Section 352(a)(1) of the Immigration and Nationality Act of 1952, *supra*, by having a continuous residence of three years in the territory of a foreign state of which she was formerly a national, and holding that Section 352(a)(1) is constitutional (R. 24). Also before the court of appeals is the government's cross-appeal from the order of the district court that it had juris-

diction to entertain petitioner's suit for declaratory relief (see *infra*, pp. 4, 7–8). Petitioner seeks certiorari before judgment in that court.

1. Petitioner who was born in Germany on May 28, 1934, came to the United States with her parents in April 1939. On December 4, 1950, she acquired American citizenship through the naturalization of of her parents. In 1956, she married a German citizen and has since resided in Germany with her husband (R. 2–3, 16–17).[1] In administrative proceedings which were concluded in January 1960, petitioner was denied an extension of her United States passport and was found to have lost her United States nationality under Section 352(a)(1) of the Immigration and Nationality Act (R. 3–4, 12A–12C, 17–19).

2. On February 1, 1960, petitioner filed suit against the Secretary of State in the District Court for the District of Columbia seeking declaratory and injunctive relief. In her complaint she alleged, *inter alia*, that Section 352(a)(1), in that it applied only to naturalized American citizens and not to citizens by birth, is grossly discriminatory and violates the due process clause of the Fifth Amendment (R. 1–5).[2]

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[1] Except that during September and October 1957 she made a six-week visit to the United States (R. 10, 16).

[2] On April 15, 1960, petitioner filed an application for the convening of a three-judge court under 28 U.S.C. 2282, 2284 (R. 13). On July 19, 1960, after a hearing, this application was denied by District Judge Matthews (R. 14–15). A subsequent application to Judge Fahy, as Acting Chief Judge of the Circuit, to convene such a three-judge court was denied. See *Schneider* v. *Herter*, 283 F. 2d 368 (C.A.D.C.).

The Secretary of State, in a motion to dismiss (R. 6) and an answer (R. 20–21), asserted, among other things, that the district court was without jurisdiction to entertain the declaratory judgment action because Section 360 of the Immigration and Nationality Act of 1952 provides the exclusive remedy for one residing abroad who claims a denial of citizenship rights, and that Section 352(a)(1) is constitutional. The district court held that it had jurisdiction of the declaratory judgment suit (R. 14–15) but granted the Secretary's motion for judgment on the pleadings on the ground that Section 352(a)(1) is a constitutional exercise of Congressional power (R. 24).

3. Petitioner noted an appeal from this judgment (C.A. No. 15,959), and the Secretary of State filed a cross-appeal from the order of the district court denying the motion to dismiss for lack of jurisdiction (C.A. No. 16,002).

After the filing of briefs and oral argument, the court of appeals, on March 24, 1961, *sua sponte* issued an order postponing its decision on these appeals until after this Court had decided *Herter* v. *Cort*, No. 567, 365 U.S. 808 (R. 25; Pet. App. B 2a). On April 25, 1961, the court of appeals denied petitioner's motion to vacate its March 24th order and promptly decide the case, or, in the alternative, to certify the cause to this Court under 28 U.S.C. 1254(3) (R. 26; Pet. App. B 3a).

ARGUMENT

Asserting that this case raises constitutional issues closely intertwined with those before this Court in

Rusk v. *Cort*, No. 567, and *Kennedy* v. *Mendoza-Martinez*, No. 566, petitioner urges the Court to adopt the unusual procedure of granting certiorari in this case while it is pending on appeal in the court of appeals. It is the government's view that no persuasive reasons have been advanced which would justify such a "deviation from normal appellate processes." Rule 20 of the Revised Rules of this Court.

1. The constitutional question in this case and the one raised in *Cort* (and *Mendoza-Martinez*) are similar only in a broad generic sense. While both *Cort* and this case posit, as the ultimate issue, the constitutional power of Congress to adopt expatriation legislation, the two cases concern separate and discrete exercises of that power. Each case involves a distinct statutory provision, different operative facts, and different constitutional considerations.

In the *Cort* case the crucial inquiry is whether Congress has the power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen who, in time of national emergency, remains outside the United States to evade or avoid service in the armed forces of the United States. This statutory provision stems initially from a Civil War statute, and its immediate predecessor was adopted in 1944 to meet a need that had arisen after the institution of the draft in World War II (see Brief for Appellants in *Mackey* v. *Mendoza-Martinez*, No. 29, O.T. 1959, pp. 16–19). It is aimed at those who, during periods of war or emergency, absent themselves from

the territorial jurisdiction of this country to avoid their military obligations; the validity of the provision raises important and difficult questions concerning the extent of the congressional power over an American national (whether naturalized or native-born) who has refused to perform a cardinal duty of citizenship, has immunized himself from sanctions for such failure by remaining without the territorial confines of the United States, and has sought refuge within the jurisdiction of another country. The constitutionality of this provision is supported, in our view, not only by the foreign affairs power of Congress, but also under the war power and the inherent right of a sovereign state to divest citizenship from one who rejects a paramount duty of such status.

The instant case, on the other hand, involves a wholly different statutory provision. Petitioner lost her citizenship under Section 352(a)(1) of the 1952 Act, *supra*, p. 2, for having a continuous residence for three years in the territory of a foreign country (Germany) of which she was formerly a national. This section of the 1952 Act stems from Section 404(a) of the Nationality Act of 1940, 54 Stat. 1137, 1170,[3] its aim being to "lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens and their offspring residing for

[3] Section 2 of the Expatriation Act of 1907, 34 Stat. 1228, had provided, in part, that a naturalized citizen who shall have resided for two years in the foreign state from which he came should be presumed to have lost American citizenship. This presumption was rebuttable.

prolonged periods in foreign lands." *Lapides* v. *Clark*, 176 F. 2d 619, 621 (C.A.D.C.), certiorari denied, 338 U.S. 860 (upholding the constitutionality of Section 404(c) of the Nationality Act of 1940, which provided for the expatriation of a naturalized citizen who resided continuously for five years in a foreign state other than that of his origin or former nationality). Unlike the statutory provision in *Cort*, Section 352(a)(1) affects only naturalized citizens, rests almost exclusively on the foreign affairs power, and finds its major challenge in the argument that it improperly discriminates between naturalized and native-born citizens. See *Lapides* v. *Clark*, *supra*. In short, to consider this case with *Cort* on the constitutional question would, we believe, inject new and difficult issues better left to separate study and consideration as well as to initial canvassing by the court of appeals, instead of clarifying and illuminating the question already posed in *Cort*.

2. The procedural issue posed in the *Cort* case is also present in this case—whether a person outside the United States can bring a declaratory judgment action to declare his nationality, or whether his exclusive remedy is under Section 360 of the Immigration and Nationality Act of 1952. However, we do not believe that it is a sufficient basis for joint consideration of the two cases. Petitioner's interest in the resolution of the procedural issue would be fully served by permitting her to file a brief as *amicus curiae* in the *Cort* case on this procedural question. In this way petitioner would be afforded an opportunity to present her views and thereby assist the

Court in its analysis of the common question, without requiring the Court, at this intermediate stage, to grapple with the separate constitutional question.*

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1961.

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*It should also be pointed out that there is now pending in the Court of Appeals for the District of Columbia, also awaiting the outcome of *Cort*, the companion case of *Herter* v. *Guerrieri*, C.A. No. 16,122. In that case the appellee has instituted a declaratory judgment suit claiming that she had been denied rights of American citizenship under Section 352(a)(2) of the 1952 Act, which provides for loss of nationality where a naturalized citizen has a continuous 5-year residence in a foreign state other than his place of origin or nationality. The district court, finding that the government had failed to establish by clear, convincing and unequivocal evidence that Mrs. Guerrieri's two visits to this country during the 5-year period had not broken the continuity of her residence abroad, held that she was an American citizen. It also found that it had jurisdiction to entertain the suit for declaratory relief. *Guerrieri* v. *Herter*, 186 F. Supp. 588 (D.D.C.). While petitioner does not assert that there are any facts here, as in *Guerrieri*, which would remove her from the operation of Section 352(a)(1), she did, in her reply brief in the court of appeals, advert to the factual findings in *Guerrieri* and noted that her 1957 visit to this country was "substantially equivalent in duration" (see Appellant's Reply Brief in C.A. No. 15,959, p. 13).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 963

ANGELIKA L. SCHNEIDER, *Petitioner,*

v.

DEAN RUSK, individually, and as SECRETARY OF STATE, *Respondent.*

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Respondent does not challenge that the constitutional issue presented by this case is important and should be decided by this Court.

2. Respondent admits that the same issue—the extent of the foreign affairs power as a justification for deprivation of citizenship—is present in this case as well as in *Rusk* v. *Cort*, No. 567, October Term, 1960 and *Kennedy* v. *Mendoza-Martinez*, No. 566, October Term, 1960 where this Court has already granted certiorari.[1] It is clear that this is the central common

[1] The distinction sought to be raised, that the present case involved a statute designed to "lessen friction with two governments . . . ." should be properly compared with respondent's jurisdictional statement in *Cort* and its brief in *Mendoza* which state that the statute there is designed to avoid "international complications".

issue in all these cases and that the same principles governing the limitations on the foreign affairs power must be applied in each.[2] The Court, therefore, we submit, would be assisted by a joint consideration of these cases.

3. It is also argued as a distinction between this case and the *Cort* and *Mendoza* cases that here the additional issue of discrimination between native born and naturalized citizens is present. This does not, of course, minimize the desirability of joint consideration of these cases and their closely similar issues.

4. In any event the issue is clear, the record complete, and the case ready for decision. It is submitted that the issue is an important one requiring decision by this Court and that it should not be delayed, with unfortunate consequences to petitioner and many others in a similar situation, merely to await a Court of Appeals decision on a constitutional issue which bears no promise of being of assistance to this Court.

The petition should be granted now so that this case may be set for argument together with *Cort* and *Mendoza* early in the October 1961 Term.

Respectfully submitted,

MILTON V. FREEMAN

June 13, 1961

[2] The Government suggests that the war power and what is referred to as the "inherent right of a sovereign state to divest citizenship" are also involved in the cases before the Court. In the light of *Trop* v. *Dulles*, 365 U.S. 80 (1958), it may be doubted what serious support the statutes involved in *Cort* and *Mendoza* can obtain from these contentions.